BEFORE THE

DEPARTMENT OF TRANSPORTATION

WASHINGTON, D.C.

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| In the Matter of | : | |
| | : | Dockets OST-97-2881 |
| COMPUTER RESERVATION SYSTEM | : | OST-97-3014 |
| (CRS) REGULATIONS | : | OST-98-4775 |
| | : | OST-99-5888 |

# ANSWER OF CONTINENTAL AIRLINES, INC.

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January 13, 2003

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ANSWER OF
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Continental[1] urges the Department to reject the eleventh-hour attempt by Sabre, the world's largest computer reservations system ("CRS"), to prolong the status quo by requesting a "fact-finding hearing" on questions the Department has already analyzed fully, and can continue to analyze, without oral testimony. Commencing an oral hearing here would be contrary to the Department's practice in previous CRS rulemakings and would delay this proceeding interminably. The public interest demands rejection of Sabre's petition and expedited completion of the almost six-year old CRS rulemaking.

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1 Common names of companies are used.

Continental states as follows in support of its position:

1. Secretary Mineta denied a Congressional request to postpone issuing the Department's November 15, 2002 CRS Notice of Proposed Rulemaking only briefly because "a thorough reexamination of DOT's CRS rules is long overdue," and the Secretary has "personally committed to move forward with a review of the existing rules, and . . . made the completion of this rulemaking proceeding a departmental priority." (Letter from Secretary Norman Y. Mineta to Congressman James L. Oberstar, dated November 5, 2002) The Department's recent extension of the comment period at Sabre's request has delayed these important goals, and granting Sabre's last-minute request for an unprecedented and unnecessary oral hearing would subvert them further.

2. Neither the Administrative Procedure Act ("APA") nor the Department's procedural rules require oral hearings for informal rulemaking proceedings, and commencing such a hearing in this CRS proceeding would be inconsistent with the procedures the Department and the Civil Aeronautics Board ("Board") have followed in previous CRS rulemakings.[2] While Sabre attempts to

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[2] Sabre says the Data Quality Act ("Act") requires the Department to correct the record in the CRS rulemaking proceeding, but the Act only requires the Department to issue guidance and procedures on quality standards for information disseminated by the Department, which Sabre concedes it has done. See Sabre's Petition at 23. The Act does not require the Department to hold an oral hearing in this rulemaking. Similarly, Sabre's charge that the Department has violated the APA by not submitting the results of its 1994-95 study of the CRS industry is totally inconsistent with Sabre's simultaneous complaint that the proposed rule is based on stale evidence. (Sabre Petition at 13-15) In any event, to the extent Sabre has complaints about the information in the record, it has ample opportunity to correct it.

characterize the CRS rulemaking proceeding as a "quasi-judicial" proceeding and says it involves "disputed adjudicative facts,"[3] the Board concluded otherwise when it rejected similar requests of American and United for oral evidentiary hearings in the original CRS rulemaking. The Board declared there that, "The need for oral evidentiary hearings . . . turns not only on the nature of the facts to be presented, but also on the purpose of any proceeding" and recognized that the goal of formulating rules of general applicability for prospective application is "particularly well served by informal rulemaking proceedings." (Order 83-10-74 at 3) The Board's notice and comment procedures in the original CRS rulemaking were upheld by the United States Court of Appeals for the Seventh Circuit. (United Air Lines, Inc. v. C.A.B., 776 F.2d 1107, 1116-1122 (7th Cir. 1985)(Posner, J.)) Moreover, that court rejected United's contention that it was entitled to an oral evidentiary hearing in the original CRS rulemaking. (Id. at 1119)

Even in enforcement proceedings involving CRS issues, the Department has refused to hold oral, evidentiary fact hearings like the hearing requested by Sabre. (See, e.g., Order 90-6-21 (deciding American's complaint against Iberia for ending its participation in Sabre without the oral hearing requested by Iberia)) While Sabre correctly points out that "similar hearings have been requested by air carriers in connection with reviews of airline alliance, international air service proceedings, and citizenship issues" (Sabre Petition at 20), it fails to add that the Department has uniformly rejected such requests. Carrier selection proceedings and citizenship

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[3] Sabre Petition at 18.

cases are routinely decided without an oral, evidentiary hearing, and the Department has "never used formal hearing procedures" in alliance cases.[4]

3. Sabre claims the oral, evidentiary fact hearing it now seeks "need not delay" the CRS rulemaking, but Sabre's latest petition, like its November 22 extension request, is clearly intended to delay the long-overdue decision on CRS issues and maintain the status quo as long as possible. The hearing Sabre envisions would, of necessity, extend far beyond the May 15 date on which the comment period is now expected to end. Under Sabre's scenario, the Department would first have to appoint a "qualified officer" to preside over the hearing. Then, a "Fact-Finding" notice covering at least the alleged disputed facts listed by Sabre would have to be issued. All interested parties would have to have an opportunity to present witnesses and testimony. Additionally, there would be "cross-examination" of witnesses, which Sabre says is "critical," by multiple parties.[5]

4. None of the reasons advanced by Sabre warrants commencement of the oral hearing it seeks. Sabre says there are a number of "disputed material facts present here," but its list of alleged factual questions contains policy questions,

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[4] Order 2001-12-5 at 3. Even in the first American/British Airways alliance proceeding, where the case for an oral hearing was far more compelling, ascertainable facts were far more important than in this rulemaking proceeding and the Department should have held an oral, evidentiary hearing, the Department was willing to hold only an oral argument. (Id. at n.13)

[5] In addition to Sabre, Galileo, the world's second-largest CRS, has already indicated that it "would hope to participate in presentation of evidence and examination of witnesses by other parties" if Sabre's petition is granted. Galileo Answer, January 3, 2003, at 2.

speculation about the industry and future competition and legal conclusions, including, for example:

- "Whether the advent and growth of Internet travel distribution, direct-connect airline systems to travel agents, and airline divestiture of CRSs negate the need for and authority of the Department to regulate non-airline-owned or -marketed CRSs;"
- "Whether elimination of the Rule or any provisions thereof would lead to anticompetitive outcomes that could not be adequately addressed by existing antitrust and consumer protection laws enforced by the Department of Justice and Federal Trade Commission;" and
- "Whether further vertical integration of the horizontally concentrated airline industry into travel distribution would be likely to produce continued anticompetitive effects in relevant markets."

(Sabre Petition at 3-4) As the Seventh Circuit recognized when it upheld the Board's decision not to hold an oral, evidentiary hearing in the first CRS rulemaking, "cross-examination is perhaps not a terribly useful tool for extracting the truth about what are at bottom complex economic phenomena" and it is questionable whether " an antitrust trial elucidates more than it confuses the issues." (United v. C.A.B., 766 F.2d at 1121)

In any event, "the weight of authority, much of it in the Supreme Court . . ., is overwhelmingly against forcing an administrative agency to hold an evidentiary hearing to resolve disputed questions of antitrust fact." (766 F.2d at 1119) Moreover, whatever the nature of Sabre's questions, Sabre has already addressed, and can continue to address, its questions in written comments. Similarly, to the extent the record contains "stale" or "erroneous" material facts, or omits facts, as

Sabre contends,[6] the extended comment and reply comment periods Sabre secured last month will provide more than ample opportunity for Sabre and other parties to supplement the record and to refute any inaccurate, out-of-date or otherwise incorrect facts.

5. The current CRS rulemaking has been pending for almost six years, and, despite numerous opportunities, Sabre has not previously questioned the notice and comment procedure used in this and previous CRS rulemakings. Shortly after the Department issued its Advance Notice of Proposed Rulemaking ("ANPRM"), for example, Sabre asked for an extension of time for filing comments without seeking an oral hearing. (Letter from Sabre counsel to then DOT General Counsel Nancy E. McFadden, dated September 29, 1997) Sabre subsequently submitted two sets of comments and reply comments on the ANPRM without asking for an oral hearing.[7] Sabre's recent written presentation to OMB outlined several areas of "Needed Analysis by DOT," but also failed to suggest an oral hearing.[8] Just one month ago, after the Department had issued its proposed rule, Sabre and others asked the Department to extend the comment period by three months but did not complain about the lack of an oral hearing. Instead, Sabre and the other petitioners

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6 Sabre Petition at 7 and Appendix A.

7 See Comments of The Sabre Group, Inc., dated December 9, 1997; Reply Comments of The Sabre Group, Inc., dated February 3, 1998; Comments of Sabre Inc., dated September 22, 2000; Reply Comments of Sabre Inc., dated October 27, 2000.

8 See "Travelocity/Sabre Internal Presentation on Orbitz and CRS," Docket OST-97-2881, docketed June 26, 2002.

claimed they needed more time to prepare written comments and reply comments, "to gather the information requested by the Department, to undertake the analyses required by the NPRM and draft meaningful pleadings." (Petition of Sabre, et al., dated November 22, 2002, at 3) The Department has acceded to Sabre's request for a three-month extension of the comment period, and there is no justification whatever for granting its last minute request for an oral hearing.

For the foregoing reasons, the Department should reject Sabre's attempt to prolong the CRS rulemaking and the status quo further, deny Sabre's request for an oral hearing and conclude the CRS rulemaking expeditiously.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing document upon the following persons in accordance with the Department's Rules of Practice:

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